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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AIRMAN KENNETH L. LAVENDER,
PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

Petition For a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Petitioner was denied his Sixth Amendment and Due Process right to be tried before an impartial jury when the trial judge denied his challenge for cause against the entire court-member panel after it was discovered that two of the jurors had money stolen from their purses in the jury deliberation room.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT AND DUE PROCESS RIGHT TO BE TRIED BEFORE AN IMPARTIAL JURY WHEN THE TRIAL JUDGE DENIED HIS CHALLENGE FOR CAUSE AGAINST THE ENTIRE COURT-MEMBER PANEL AFTER IT WAS DISCOVERED THAT TWO OF THE JURORS HAD MONEY STOLEN FROM THEIR PURSES IN THE JURY DELIBERATION ROOM.

CONCLUSION 9

APPENDIX A (Opinion of the United States Court of Appeals for the Armed Forces) 1a

APPENDIX B (Opinion of the United States Air Force Court of Criminal Appeals) 14a

TABLE OF AUTHORITIES

Page

Constitutional Provisions:

Fifth Amendment 1

Sixth Amendment 1

Supreme Court Cases:

In re Murchison, 349 U.S. 133 (1955) 4

Irvin v. Dowd, 366 U.S. 717 (1961) 4

Morgan v. Illinois, 112 S.Ct 2222 (1992) 4

Ross v. Oklahoma, 487 U.S. 81 (1988) 4

Turner v. Murray, 476 U.S. 28 (1986) 4

Other Federal Cases:

Hunley v. Godinez, 784 F.Supp 522 (D. Ill. 1992) . . .6, 7

Hunley v. Godinez, 975 F.2d 316 (7th Cir. 1992) 6, 7

Military Cases:

United States v. Brice, 19 M.J. 170 (C.M.A. 1985) 8

United States v. Brown, 34 M.J. 105 (C.M.A. 1992) . . .6

United States v. Dale, 42 M.J. 384 (1995) 5, 7

United States v. Daulton, 45 M.J. 212 (1996) 7

United States v. Davenport, 17 M.J. 242 (C.M.A. 1984) 4

United States v. Dinatale, 44 M.J. 325 (1996) 5

United States v. Glenn, 25 M.J. 278 (C.M.A. 1987) 5

United States v. Hamilton, 41 M.J. 22 (C.M.A. 1994) 5

United States v. Harris, 13 M.J. 288 (C.M.A. 1982) 9

United States v. Henry, 37 M.J. 971 (A.C.M.R. 1993) 5

United States v. Jefferson, 44 M.J. 312 (1996) 7

United States v. Jobson, 31 M.J. 117 (C.M.A. 1990) 5

United States v. Lake, 37 M.J. 145 C.M.A. (1993) 5

United States v. Lavender, 46 M.J. 485 (1997) 1

United States v. Mayes, 28 M.J. 748 (A.F.C.M.R. 1989) 8

United States v. McCann, 25 C.M.R. 179 (1958) 8

United States v. Miller, 19 M.J. 159 (C.M.A. 1985) 5, 9

United States v. Minyard, 46 M.J. 229 (1997) 6

United States v. Moyar, 24 M.J. 635 (A.C.M.R. 1987) 8

United States v. Napoleon, 46 M.J. 279 (1997) 6

United States v. Nigro, 28 M.J. 415 (C.M.A. 1987) 5

United States v. Porter, 17 M.J. 377 (C.M.A. 1984) . . .6

United States v. Reichardt, 28 M.J. 113 (C.M.A. 1989) 6

United States v. Sloan, 30 M.J. 741 (A.F.C.M.R. 1990) 5

United States v. Smart, 21 M.J. 15 (C.M.A. 1985) 4, 7

United States v. White, 36 M.J. 284 (C.M.A. 1993) 5

United States v. Youngblood, — M.J. — (No. 96–1256, September 30, 1997) 6

Federal Statutes:

28 U.S.C.A. § 1259(3) (West Supp. 1996) 1

10 U.S.C.A. § 867(a) (West Supp. 1996) 1

10 U.S.C.A. § 841 (West Supp. 1996) 5

Rules for Courts-Martial

R.C.M. 912(f)(1)(N) 5

The petitioner, Airman Kenneth L. Lavender, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on August 26, 1997.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at *United States v. Lavender*, 46 M.J. 485 (1997), is located at Appendix A. The unpublished opinion of the United States Air Force Court of Criminal Appeals (No. ACM 31602, June, 13, 1996) is located at Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on August 26, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259 (3) (West Supp. 1996) and 10 U.S.C.A. § 867(a) (West Supp. 1996).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment to the Constitution of the United States Provides in relevant part:

> "No person shall...be deprived of life, liberty, or property, without due process of law..."

The Sixth Amendment of the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...."

STATEMENT OF THE CASE

Procedural History:

On 18-20 January 1995, petitioner was convicted, pursuant to his pleas of two specifications of larceny, forgery, two specifications of making and uttering bad checks, and wrongfully charging personal telephone calls to the Government, in violation of Articles 121, 123, 123a, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 921, 923, 923a, and 934, respectively. He pled not guilty to other specifications of forgery and to wrongfully endeavoring to influence the testimony of a potential witness and was acquitted of both. He pled not guilty to two other specifications of larceny and was found guilty, as to both, of the lesser-included offense of wrongful appropriation, in violation of Article 121, 10 U.S.C. § 921.

The petitioner was sentenced to a Bad Conduct Discharge, confinement for 24 months, forfeiture of $350.00 pay per month for 24 months, and reduction to Airman Basic. The convening authority approved the sentence as adjudged on April 24, 1995. On June 13, 1996 the Air Force Court of Criminal Appeals affirmed the findings and sentence. Appendix B. On August 26, 1997, the United States Court of Appeals for the Armed Forces affirmed the decision of the lower military court. Appendix A.

Statement of Facts:

The petitioner was tried at Edwards AFB, CA before a General Court-Martial consisting of officer and enlisted members for several larceny type offenses. The Court-Martial was convened on January 18, 1995. The petitioner entered mixed pleas and the government elected to prosecute some of the charges to which the Appellant pled not guilty (R. 97). The first day and a half was spent in Article 39a sessions dealing with pretrial motions and preliminary matters. The

members were called on the afternoon of July 19, 1995 (R. 144). The original panel consisted of six officers and six enlisted members (R. 144). After voir dire, the military judge granted two challenges for cause against one officer and one enlisted member (R. 184). Both trial counsel and defense counsel used their peremptory challenges against officer members (R. 185). The panel that actually heard the evidence was composed of three officers and five enlisted members.

The court was convened and the government presented evidence on the charges to which the petitioner pled not guilty. After the completion of the evidence and the defense's case the members went to another room in the base headquarters building to deliberate on findings. After they began to deliberate, one of the members discovered that some money had been stolen from her purse (R. 294). The member told the court president who, in turn, told the military judge. The military judge reopened the court and conducted voir dire of the member (R. 293–308). Upon further investigation, it was discovered that another member also had money stolen from her purse. (R. 297). All the panel members were aware of the thefts but promised to consider only the evidence they heard in court.

The trial defense counsel challenged the entire panel based on the fact that the thefts from the deliberation room affected the entire panel in addition to the actual victims of the theft (R. 308). The defense counsel expressed concerns that once the members found out that the petitioner had pled guilty to larceny and related offenses, they would think that the petitioner was the one that stole the money (R. 310). The military judge granted the challenges for cause against the two members that were the victims of the thefts, but denied the challenge against the remainder of the panel (R. 311). The judge did not instruct the remaining members not to consider the thefts or hold them against the petitioner. The remaining

panel members returned to complete deliberations on findings. They convicted the petitioner of wrongful appropriation. The panel then heard evidence and deliberated on sentence. The final panel consisted of one officer and five enlisted members.

REASON FOR GRANTING THE WRIT

THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT AND DUE PROCESS RIGHT TO BE TRIED BEFORE AN IMPARTIAL JURY WHEN THE TRIAL JUDGE DENIED HIS CHALLENGE FOR CAUSE AGAINST THE ENTIRE COURT-MEMBER PANEL AFTER IT WAS DISCOVERED THAT TWO OF THE JURORS HAD MONEY STOLEN FROM THEIR PURSES IN THE JURY DELIBERATION ROOM.

The right to be tried before a jury capable and willing to decide a case solely on the evidence before it is a cornerstone of our criminal justice system. *Irvin v. Dowd*, 366 U.S. 717 (1961). The right to an impartial jury is guaranteed by the Sixth Amendment and by principles of due process. *Morgan v. Illinois*, 112 S.Ct 2222, 2229 (1992); *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988); *Turner v. Murray*, 476 U.S. 28 (1986). A fair trial in a fair tribunal is a basic requirement of due process. *In re Murchison*, 349 U.S. 133, 136 (1955). The Appellant has an absolute right to be tried by an impartial panel of members who would resolve his case with a fair and open mind. *United States v. Smart*, 21 M.J. 15 (C.M.A. 1985); *United States v. Davenport*, 17 M.J. 242 (C.M.A. 1984).

Court-martial members[1] must be persons whose impartiality is not reasonably open to question and challenges

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[1]Military jurors are referred to as "court members." Throughout this petition the military term is retained but may be used interchangeably with the term "juror."

for cause must be liberally granted. *United States v. Dale*, 42 M.J. 384 (1995); *United States v. Glenn*, 25 M.J. 278 (C.M.A. 1987); Art. 41, UCMJ, 10 U.S.C. § 841 (1988). R.C.M. 912(f)(1)(N) (MCM, Part II, 1984) provides that "[a] member *shall* be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial *free from substantial doubt as to legality, fairness, and impartiality*." (Emphasis added).

After the thefts were discovered, the trial defense counsel challenged the entire panel for cause. In granting the challenge for cause against the two members that were the victims of the thefts, the military judge found that "the cumulative effect of having two victims on the same panel on larceny, could be very adverse to the accused, subconsciously or subjectively, despite the responses of the particular victims." (R. 311). Although he recognized the potential prejudice against the Appellant, he denied the challenge against the remaining members.

The military judge's determination is entitled to great deference and will not be reversed absent an abuse of discretion. *United States v. Dinatale*, 44 M.J. 325 (1996); *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994); *United States v. Jobson*, 31 M.J. 117 (C.M.A. 1990); *United States v. Nigro*, 28 M.J. 415 (C.M.A. 1987); *United States v. Sloan*, 30 M.J. 741 (A.F.C.M.R. 1990). The Court of Appeals for the Armed Forces has held that the actual test to apply is whether there was "a clear abuse of discretion in applying the liberal grant mandate." *United States v. Henry*, 37 M.J. 968 (A.C.M.R. 1993); *United States v. White*, 36 M.J. 284 (C.M.A. 1993); *see also United States v. Lake*, 37 M.J. 145 (C.M.A. 1993). The military judge's discretion is not absolute, it must be exercised in a manner consistent with existing principles of law. *United States v. Miller*, 19 M.J. 159 (C.M.A. 1985). In a case involving implied bias under

R.C.M. 912(f)(1)(N), appellate courts give less deference to the military judge. *United States v. Minyard*, 46 M.J. 229 (1997); *United States v. Napoleon*, 46 M.J. 279 (1997); *United States v. Youngblood*, __ M.J. __ (No. 96-1256, September 30, 1997).

In the present case, the members were acting as the finder of fact in a larceny (and related offenses). When they went to deliberate, two of the members discovered that they had money stolen from their purses. This discovery was known to all the court members and interrupted the deliberation process. During voir dire of the members, the military judge elicited responses from the majority of the members that they would not let the thefts affect their deliberation. These thefts, however, impacted each member of the panel, not just the two that actually had the money stolen. These thefts violated the sanctity of the deliberation room. A member is not per se disqualified because he or she has been a victim of a similar crime. See *United States v. Brown*, 34 M.J. 105 (C.M.A. 1992); *United States v. Reichardt*, 28 M.J. 113 (C.M.A. 1989); *United States v. Porter*, 17 M.J. 377 (C.M.A. 1984).

This case is factually similar to *Hunley v. Godinez*, 784 F.Supp 522 (D. Ill.), *affirmed*, 975 F.2d 316 (7th Cir. 1992). In *Hunley*, the defendant was charged with burglary and murder. The prosecution presented evidence that the defendant allegedly made an unforced entry into the victim's apartment and used a flashlight to look for small items to steal. The victim surprised the defendant when she returned to her apartment during the burglary. The victim reached for a kitchen knife and the defendant allegedly took it from her and fatally stabbed her.

At Hunley's trial, the jury deliberated until 10:00 p.m. At that point the jury was sequestered and the jury was taken for an overnight stay at a nearby hotel. During the night, an

unknown burglar entered two of the juror's rooms and stole a watch and some money from the jurors. The jurors discovered the thefts the next morning. All of the jurors were aware of the thefts and discussed it among themselves. Hunley was convicted and filed a writ of *habeas corpus* with the federal district court. The district court found that the series of events, when viewed as a whole, presented a case of presumptive bias and granted the writ of *habeas corpus*. *Hunley*, 784 F.Supp at 533. In affirming the district court, the Court of Appeals for the Seventh Circuit recognized that "[t]he burglary placed the jurors in the shoes of the victim...." 975 F.2d at 319. Likewise, in the case *sub judice*, the thefts from the deliberation room placed the court members in the place of the victim.

The Court of Appeals for the Armed Forces has reversed military judges for denying challenges for cause where court members have been victims of similar crimes. *United States v. Daulton*, 45 M.J. 212 (1996); *Smart, supra*. In *Daulton*, one court-martial member revealed during voir dire, that her sister claimed to have been abused as a child by their grandfather. As a result, her sister had undergone many years of mental therapy. When asked if the member believed her sister's allegations, she said that she was initially in denial, but now believed them because her mother "had a similar situation" with her grandfather. The military judge denied the trial defense counsel's challenge for cause against this member. The Court of Appeals for the Armed Forces reversed the military judge stating that "asking [the challenged member] to serve as an impartial member was 'asking too much of both [her] and the system.'" *United States v. Dale*, 42 M.J. 384, 386 (1995) *quoting United States v. Dale*, 39 M.J. 503 (A.F.C.M.R. 1993)(Pearson, J. dissenting). *See also, United States v. Jefferson*, 44 M.J. 312 (1996).

The Service Courts of Criminal Appeals have also reversed military judges' denials of causal challenges when the challenged member had been a victim of a similar crime. In *United States v. Moyar*, 24 M.J. 635 (A.C.M.R. 1987), the Army Court of Military Review found an abuse of discretion where the trial judge denied a challenge for cause against a member whose sister had been sexually abused some twenty-six years earlier by his father. Despite affirmative responses by the member to questions about his ability to "fairly" perform his duties, set aside "everything else" and act solely upon the evidence[,]" the appellate court was not satisfied that the "proceedings [were] free from substantial doubt as to legality, fairness, and impartiality." *Moyar* at 639.

In *United States v. Mayes*, 28 M.J. 748, 752 (A.F.C.M.R 1989) the Air Force Court of Military Review, after citing *Moyar*, explained: "When a member's life has been affected adversely by criminal conduct similar to that charged against an accused, bias is more readily "implied," despite a member's response to the contrary." *Id.* Although the effects of these thefts may not be long lasting, it is the timing of the thefts that is most troubling. These thefts were discovered as the members began their deliberations.

The Court of Appeals for the Armed Forces has held that the timing of certain events may be grounds for a mistrial. In *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985) the Court reversed the accused's conviction for drug use when the court proceedings were interrupted by a mandatory commandant's lecture on drug use. *See also, United States v. McCann*, 25 C.M.R. 179 (1958).

The court proceedings in the case *sub judice* were interrupted by the larceny. Although the military judge conducted voir dire of the members, the responses elicited were perfunctory in nature and unaccompanied by any explanation from the members as to why they should be

believed. In addition, the military judge failed to take any steps on his own to insure that these members understood the standard of impartiality required of them in view of the events in this case. Finally the military judge's decision reflects a disregard of the realities of military life which create unique problems with respect to perception of fairness in criminal trials. *Miller, supra*, at 164 (citations omitted).

The Court of Appeals for the Armed Forces has "inferred that where circumstances are present which raise 'an appearance of evil' in the eye of disinterested observers, mere declarations of impartiality, no matter how sincere, are not sufficient by themselves to insure legal propriety." *United States v. Harris*, 13 M.J. 288, 292 (C.M.A. 1982) (citations omitted).

CONCLUSION

The petitioner has been denied his Sixth Amendment and due process rights to a fair and impartial jury. This occurred when an unknown thief stole money from two of the jurors' purses while they were deliberating on the petitioner's case. The thefts placed the jurors in the shoes of the victim of the petitioner's offense and unfairly prejudiced him.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 1997

APPENDIX

APPENDIX A

UNITED STATES, Appellee

v.

Kenneth L. LAVENDER, Airman U.S. Air Force, Appellant.

No. 96–1233.

Crim.App. No. 31602.

U.S. Court of Appeals for the Armed Forces.

Argued March 12, 1997.

Decided Aug. 26, 1997.

Accused was convicted by general court-martial, Charles W. Hasskamp, J., of larceny, forgery, making and uttering bad checks, and wrongfully charging personal telephone calls to the government. The United States Air Force Court of Criminal Appeals affirmed. Review was granted. The United States Court of Appeals for the Armed Forces, Gierke, J., held that implied bias doctrine did not entitle accused to have entire court-martial panel removed for cause after two of its members had money stolen from their unattended purses in jury deliberation room.

Affirmed.

Effron, J., filed opinion concurring in part and in result.

Crawford, J., filed opinion concurring in result.

[1] MILITARY JUSTICE 884.1
258Ak884.1
Implied bias doctrine did not entitle accused to have entire court-martial panel removed for cause after two of its

members had money stolen from their unattended purses in jury deliberation room; thefts from panel members differed significantly from larceny, forgery, and making and uttering bad checks charges against accused, crimes against panel members did not involve invasion of home or potential for violence, members whose money was stolen were removed from panel, there was no evidence that any remaining panel member manifested concern about incident, remaining panel members acquitted accused of several charges, and defense counsel chose not to question panel members about impact of thefts. UCMJ, Arts. 121, 123, 123a, 10 U.S.C.A. §§ 921, 923, 923a; R.C.M. 912(f)(1)(N)

[2] MILITARY JUSTICE ⚷ 884.1
258Ak884.1
Rule excusing court member for cause in interest of having court-martial free from substantial doubt as to its legality, fairness, and impartiality includes challenges based on actual bias as well as implied bias. R.C.M. 912(f)(1)(N).

[3] MILITARY JUSTICE ⚷ 1420
258Ak1420
Court of Appeals for the Armed Forces applies abuse of discretion standard when reviewing rulings on challenges to court members for cause, but is less deferential on questions of implied bias. R.C.M. 912(f)(1)(N)

[4] MILITARY JUSTICE ⚷ 1419
258Ak1419
Court of Appeals for the Armed Forces reviews ruling on challenge to court members for implied bias through the eyes of the public; focus is on perception or appearance of fairness of military justice system. R.C.M. 912(f)(1)(N).

[5] MILITARY JUSTICE 🔑 1414.1
258Ak1414.1
As general proposition, defense counsel may not decline to inquire into potentially prejudicial information and then claim on appeal that information was prejudicial.

***485** For Appellant: Captain W. Craig Mullen (argued); Colonel David W. Madsen (on brief); Lieutenant Colonel Kim L. Sheffield and Major Kevin P. Koehler.

For Appellee: Captain Libby A. Brown (argued); Colonel Theodore J. Fink and Major LeEllen Coacher (on brief); Lieutenant Colonel Michael J. Breslin.

***486** Opinion of the Court

GIERKE, Judge:

A general court-martial composed of officer and enlisted members convicted appellant, pursuant to his pleas, of larceny (2 specifications), forgery, making and uttering bad checks (2 specifications), and wrongfully charging personal telephone calls to the Government, in violation of Articles 121, 123, 123a, and 134, Uniform Code of Military Justice, 10 USC §§ 921, 923, 923a, and 934, respectively. He pleaded not guilty to one other specification of forgery and to wrongfully endeavoring to influence the testimony of a potential witness in a nonjudicial punishment proceeding, and was acquitted of both. He pleaded not guilty to two other specifications of larceny but, as to each, was found guilty of the lesser-included offense of wrongful appropriation, in violation of Article 121. [FN*]

> FN* We heard oral argument in this case at the United States Air Force Academy, Colorado Springs, Colorado, on March 12, 1997, as part of "Project Outreach." *See United States v. Allen,* 34 MJ 228, 229 n. 1 (CMA 1992). At the close of the

> hearing, Chief Judge Cox, speaking on behalf of the Court, recognized the distinguished 38-year Air Force career of Colonel Richard Lee, who had served at the Air Force Academy for 21 years, the last 9 of which as the head of the Law Department. Colonel Lee was retired from the Air Force as a Brigadier General on March 31, 1997.

Appellant's adjudged and approved sentence provides for a bad-conduct discharge, confinement and partial forfeiture of pay for 24 months, and reduction to the lowest enlisted grade. The Court of Criminal Appeals affirmed the findings and sentence in an unpublished opinion.

Our Court granted review of the following issues:

> I
>
> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY DENYING APPELLANT'S CHALLENGE FOR CAUSE AGAINST THE ENTIRE COURT-MARTIAL PANEL AFTER IT WAS DISCOVERED THAT TWO OF THE MEMBERS HAD MONEY STOLEN FROM THEIR PURSES IN THE JURY DELIBERATION ROOM.
>
> II
>
> WHETHER THE MILITARY JUDGE ERRED TO THE SUBSTANTIAL PREJUDICE OF APPELLANT BY FAILING TO SUA SPONTE DECLARE A MISTRIAL ONCE IT WAS DISCOVERED THAT TWO OF THE COURT MEMBERS HAD MONEY STOLEN FROM THEIR PURSES IN THE JURY DELIBERATION ROOM.

With respect to Issue I, we hold that the military judge did not abuse his discretion by denying the challenges for cause. With respect to Issue II, we hold that the military judge had no duty to declare a mistrial, since the challenges were properly denied.

The panel convened to hear appellant's case was composed of six officer and six enlisted members. After challenges, the panel was reduced to three officer and five enlisted members.

After both sides rested and deliberations on findings began, Major (Maj) P. a panel member, discovered that $20.00 had been stolen from her purse. She informed the president of the panel in the presence of all the panel members. She then informed the military judge.

The military judge convened an Article 39(a), ACME, 10 USC § 839(a), session to question the panel members individually about the impact of the larceny. The military judge asked Maj P. "[H]as this particular incident today affected you in any way in which you might think would affect your impartiality in this particular proceeding?" She responded, "No, sir. I just feel kind of—I should have been more careful leaving my purse unattended. That is the only thing." Trial counsel asked Maj P if she would "be able to discount what has happened to you today in deriving [sic] at what would be a fair and just sentence for the accused." She responded, "I can." Defense ***487** counsel declined to question Maj P. Maj P volunteered that Captain (Caps) S also believed that some money had been taken from her wallet.

Lieutenant Colonel (LtCol) P. the panel president, was questioned and said that the incident would not affect his ability to continue sitting as a member. He was concerned, however, that "there may be an emotional tone that could [a]ffect at least one of those jurors." He identified that member as Capt S. Defense counsel declined to question LtCol P.

Capt S. the second larceny victim on the panel, was asked by the military judge, "[H]ow has this affected you?" She responded, "It has no effect whatsoever, as far as the proceedings go." The military judge asked how she felt, and she said she was "disappointed" that someone in the headquarters building would ''go through" the personal effects of Maj P and herself.

Trial counsel asked Capt S if she would "be able to disregard your own feelings about the person who took your money, when you are thinking about Airman Lavender." She responded, "Absolutely." Defense counsel declined to question Capt S.

All five enlisted members were asked similar questions by the military judge and trial counsel and gave similar responses. Defense counsel asked three enlisted members if Maj P and Capt S mentioned when the money was taken. Two responded that they did not, while one stated she "heard that it was during the morning break, before lunch." At defense request, Capt S was recalled for further voir dire, and defense counsel asked her if she knew when the money was taken. She responded that it could have been taken at any time between 8:00 a.m. and 11:50 a.m.

Defense counsel then challenged the entire panel. Defense counsel argued that the larcenies affected the entire panel, and he expressed concern that once the members found out during the sentencing hearing that appellant had pleaded guilty to larceny and related offenses, the members would think that appellant had stolen the panel members' money. Trial counsel opposed the challenge to the entire panel but joined in the challenge of Maj P and Capt S. The military judge granted the challenge of Maj P and Capt S but denied the challenge of the remaining members.

The remaining members, LtCol P and the five enlisted members, resumed deliberations. They found appellant not

guilty of wrongfully endeavoring to influence the testimony of a potential witness and of the contested forgery; and not guilty of the two contested larcenies but guilty of the lesser-included offenses of wrongful appropriation.

The primary evidence of the alleged forgery and larcenies was the testimony of the victim, Ms. W. She testified that while appellant was living at her parents' house, he took a check from her checkbook, wrote it for $80.00, and cashed it. She learned about appellant's acts when the bank asked her if she knew about a check that had been used out of numerical sequence. She confronted appellant, and he admitted taking, writing, and cashing the check. He promised to repay the money and did so on the day after Ms. W confronted him. On cross-examination Ms. W admitted that she had given appellant permission to sign her name to checks "on a couple of other occasions" and had given him a Texaco credit card with her name on it.

[1] Appellant asserts that the military judge erred by denying the challenge of the entire panel. He argues that the remaining court members were also victims, because the thefts violated the sanctity of the deliberation room.

[2] RCM 912(f)(1)(N), Manual for Courts-Martial, United States (1995 ed.), provides that a court member "shall be excused for cause whenever it appears that the member . . . [s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." This rule includes challenges based on actual bias as well as implied bias. *United States v. Napoleon,* 46 MJ 279, 283 (1997); *United States v. Minyard,* 46 MJ 229, 231 (1997), citing *United States v. Daulton,* 45 MJ 212 (1996); and ***488** *United States v. Harris,* 13 MJ 288, 292 (CMA 1982). RCM 912(f)(3) provides that "[t]he burden of establishing that grounds for a challenge exist is upon the party making the challenge."

[3] We review rulings on challenges for cause for abuse of discretion. On questions of actual bias, we give the military judge Great deference because we recognize that he has observed the demeanor of the participants in the voir dire and challenge process." *United States v. Napoleon, supra,* quoting *United States v. White,* 36 MJ 284, 287 (CMA 1993).

[4] We are less deferential on questions of implied bias. Implied bias is reviewed through the eyes of the public. *Napoleon, supra,* citing Daulton, 45 MJ at 217. The focus "is on the perception or appearance of fairness of the military justice systems *United States v. Dale,* 42 MJ 384, 386 (1995)

Appellant urges this Court to consider *Hunley v. Godinez,* 784 F.Supp. 522 (N.D.111.), aff'd, 975 F.2d 316 (7th Cir.1992), as supporting his assertion that the entire panel should have been challenged for implied bias. In Hunley the defendant was tried for burglary and murder. He had made an unforced entry into an apartment looking for small items to steal. When he was surprised by the occupant, he killed her with a kitchen knife and fled.

While Hunley's jury was sequestered in a hotel overnight, four jurors in two adjacent rooms were burglarized in a manner similar to Hunley's burglary. The burglar made an unforced entry into each room with a pass key and stole money and other small items. All 12 jurors discussed the burglaries among themselves. Within an hour after deliberations resumed the next day, four holdout jurors changed their votes from "not guilty" to "guilty." Defense counsel's request for a mistrial was denied. Hunley was convicted and sentenced to confinement for 40 years. 784 F.Supp. at 523–24.

Hunley filed a habeas corpus petition under 28 USC § 2254, contending inter alia that he was denied his right to due process and trial by an impartial jury. The United States

District Court granted the petition. 784 F.Supp. at 533. The State of Illinois appealed, and the Seventh Circuit affirmed. 975 F.2d 316.

Although appellant argues that Hunley supports his case, we conclude that the principles of law set out by the Seventh Circuit in Hunley and the factual differences between appellant's case and Hunley warrant a different result.

Hunley recognized that use of implied bias to overturn a conviction his certainly the rare exception." Quoting *Smith v. Phillips,* 455 U.S. 209, 217, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1982), the court observed "that due process does not require a new trial every time a juror has been placed in a potentially compromising situation." 975 F.2d at 318. The usual redress for jury bias is "a hearing in which the defendant is afforded the chance to prove actual bias." *Id.* Although Hunley found implied bias, that decision concludes by stating that the "holding is limited to the very unique facts stated herein" and that "the 'implied bias' test should rarely apply. *Id.* at 320; accord *Tinsley v. Borg,* 895 F.2d 520, 527 (9th Cir.1990), citing Smith, 455 U.S. at 222–23 n. *, 102 S.Ct. at 948 (O'Connor, J., concurring) (implied-bias doctrine should be applied only in "extreme" or "extraordinary" cases).

[5] In this case defense counsel was afforded a hearing but chose not to question the panel members about the impact of the larcenies. Instead, he limited his examination to determining when the larcenies were discovered. As a general proposition, defense counsel may not decline to inquire into potentially prejudicial information and then claim on appeal that the information was prejudicial. *See United States v. Simonds,* 15 USCMA 641, 643–44, 36 CMR 139, 141–42, 1966 WL 4431 (1966) (defense counsel did not request inquiry into prejudicial information given to court members "in some unknown manner" but contended on appeal that the information was prejudicial).

We note several significant factual differences between appellant's case and Hunley. First, unlike Hunley, this was not a case where the court members stood "in the shoes ***489** of the victim." 975 F.2d at 319. The larcenies from the two court members occurred under circumstances significantly different from the larcenies involved in this case. Appellant was charged with taking and forging a check from the checkbook of a woman with whose family he was living. The woman confronted him; he admitted taking and cashing the check; and he gave her the money back.

Second, the nature of the crimes involved in Hunley was much more intimidating than the crimes involved in appellant's case. In Hunley the defendant was charged with violating a woman's home and then killing her when she unexpectedly confronted the defendant. While the jurors in Hunley were deliberating, their temporary home during sequestration was violated under circumstances disturbingly similar to Hunley's crimes. The jurors were understandably concerned that the crimes against them could have resulted in violence, as it did with Hunley's crimes. On the other hand, appellant's trial was for economic crimes: stealing checks, passing bad checks, and forgery. The crimes against the panel members involved a theft of unattended property, not an invasion of the home or the potential for violence.

Third, unlike Hunley where the four jurors who were burglarized remained on the jury, the two victims in appellant's case were removed.

Fourth, in Hunley the jurors "expressed concern over the incident." 975 F.2d at 317, 320. In appellant's case, there is no evidence that any panel members who remained on the case manifested any concern about the incident. Although LtCol P expressed concern about the impact of the incident on Capt S. Capt S was removed from the panel. Even Maj P. one of the victims who was removed from the panel, blamed herself,

telling the military judge that she "should have been more careful leaving my purse unattended. Defense counsel had ample opportunity to explore the impact of the incident on the panel members and declined to do so.

Fifth, unlike Hunley, the crimes against the jurors in appellant's case did not appear to affect the verdict. In Hunley, the Court of Appeals found it significant that four holdout jurors, two of whom were victims, quickly changed their votes and found the defendant guilty. 975 F.2d at 320. In appellant's case, the court members acquitted appellant of attempting to influence the testimony of a witness, forgery, and larceny, and found him guilty only of wrongful appropriation.

Finally, appellant's claim of bias on the part of the court members rings hollow in light of his failure to question the court members about their reaction to the thefts. *See United States v. Simonds, supra.*

We conclude that appellant did not carry his burden at trial of showing that his case is the "rare exception" justifying use of the implied-bias doctrine. Accordingly, we hold that the military judge did not abuse his discretion by denying the challenges for cause.

Regarding Issue II, our decision that the challenge to the entire panel was properly denied removes any manifest necessity to declare a mistrial "in the interest of justice." *See United States v. Brooks,* 42 MJ 484, 487 (1995). Accordingly, there was no abuse of discretion in failing to sue sponte declare a mistrial.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge COX and Judge SULLIVAN concur.

EFFRON, Judge (concurring in part and in the result):

I agree with most of the majority's opinion, including much of its discussion of the opinion in *Hunley v. Godinez,* 784 F.Supp. 522 (N.D.111.), aff'd, 975 F.2d 316 (7th Cir.1992). I do not agree, however, with the paragraph in the majority opinion that implicitly embraces Hunley's view of implied bias necessarily as a "rare exception" found in "the very unique facts stated [t]herein" and reflecting a test that "should rarely apply." 46 MJ at 488.

Although there are certain similarities between civilian jurors and court-martial panel members, there also are important differences. Members of a court-martial panel are ***490** not randomly selected like civilian jurors, but are personally selected by the command. Art. 25, Uniform Code of Military Justice, 10 USC § 825. In contrast to the multiple peremptory challenges in most civilian jurisdictions, each side has only one peremptory challenge in a court-martial. Art. 41(b) & (c), acme, 10 USC § 841(b) & (c). Furthermore, military judges are required to apply a liberal-grant approach to causal challenges to court-martial panel members. United States v. Napoleon, 46 MJ 279, 283 (1997).

In view of these differences, I do not agree that the military justice system should adopt the suggestion in Hunley that, in civilian trials, the doctrine of implied bias should be "rarely applied." That concept does not appear to have been endorsed in the past by this Court; it is not suggested in any of our recent cases, such as *United States v. Napoleon, supra, United States v. Minyard,* 46 MJ 229 (1997), and *United States v. Daulton,* 45 MJ 212 (1996); and it is not necessary to the disposition of this case.

Under these circumstances, although I generally concur in the opinion and in the result, I do not concur in the paragraph in question.

CRAWFORD, Judge (concurring in the result):

I agree with the result but would apply a different standard of review in implied-bias cases. *See United States v. Napoleon,* 46 MJ 279, 285 (1997)(Crawford, J., concurring in part and in the result); *United States v. Minyard,* 46 MJ 229, 232 (1997) (Crawford, J., dissenting).

APPENDIX B

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman KENNETH L. LAVENDER, FR308–78–3003
United States Air Force

ACM 31602

13 June 1996

Sentence adjudged 20 January 1995 by GCM convened at Edwards Air Force Base, California. Military Judge: Charles W. Hasskamp.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of $350 pay per month for 24 months, and reduction to E–1.

Appellate Counsel for Appellant: Colonel Jay L. Cohen and Captain W. Craig Mullen.

Appellate Counsel for the United States: Lieutenant Colonel Michael J. Breslin and Major LeEllen Coacher.

Before

DIXON, SCHREIER, and STARR
Appellate Military Judges

OPINION OF THE COURT

STARR, Judge:

The appellant pleaded guilty to multiple offenses, including larceny of checks and money, uttering worthless

checks with the intent to defraud, making unauthorized calls on a government phone, and forgery of six checks. In addition, contrary to his pleas, members convicted him of wrongful appropriation of a check and money. The dollar value of the appellant's offenses exceeded $1250. The convening authority approved the court's sentence of a bad-conduct discharge, confinement for 24 months, forfeiture of $350 per month for 24 months, and reduction to E–1. The appellant claims the military judge erred in denying a challenge for cause against the entire panel, the military judge erred in not *sua sponte* directing a mistrial, and his sentence is unduly severe. We reject all three contentions, and we affirm the approved findings and sentence.

The first two assignments of error relate to the same event—theft of money from two court members' purses in the deliberation room. The appellant entered mixed pleas, and the prosecution elected to go forward with evidence on some of the allegations to which the appellant had pleaded not guilty—obstruction of justice, forgery of a check, theft of a check, and theft of $80 by uttering a forged check. Twelve members (six officers and six enlisted members) were detailed, and following challenges three officers and five enlisted members remained. in the preliminary instructions the members were not told of the appellant's guilty pleas, only of the four contested allegations. Trial proceeded, with the presentation of evidence, argument by counsel, and legal instructions by the military judge. Shortly after deliberations began, the military judge reconvened the court, excused all but one member from the court room, and conducted an individual voir dire of the member. The member stated that someone had removed $20 from her purse, which she had left in the deliberation room during the day's proceedings. She further stated that upon discovery of the missing money, she had told the president about it in the presence of the other

members. The military judge called in the president, who reported that another female member likewise suspected money had been taken from her purse during the proceedings. That member was called in, and she too was missing $20 from her purse. The military judge conducted individual voir dire of all the members, and all of them—including the two who had money stolen—stated they could remain impartial in reaching findings and, if necessary, determining a sentence.

The defense counsel challenged the entire panel for cause, maintaining that regardless of their findings, later on when they learned the appellant had pleaded guilty to multiple larcenies, they were going to figure that he had stolen their money during a break in the proceedings. The military judge denied the challenge against the entire panel, although he did excuse the two members whose money had been taken. The remaining six members (one officer and five enlisted members) found the appellant not guilty on the forgery and obstruction of justice specifications and guilty of wrongful appropriation on the two theft specifications. Following the announcement of findings, after the military judge informed the members of the offenses to which the appellant had pleaded guilty and for which they would also be sentencing him, he permitted both sides additional voir dire. Under examination by the trial counsel, they all affirmed their continued ability to act impartially. The defense counsel asked if anyone knew the victim of the newly disclosed offenses, and no member did. There were no further questions or challenges.

The issue in this case is implied, rather than the actual bias suggested by the trial defense counsel. Every court member, including those victimized, disclaimed any ill will toward the appellant due to the thefts. After assessing the members' credibility in making their disclaimers, the issue for the military judge was the *appearance* created by this panel

deciding the case of a person accused of larceny, and who, as the panel would later learn, had also pleaded guilty to other larcenies.

A military judge must excuse a court member for cause whenever it appears the member's participation would cast substantial doubt as to the legality, fairness, and impartiality of the trial. R.C.M. 912(f)(1)(N). This is commonly known as the implied bias rule, and the military judge's focus in applying it is on the "system's appearance of fairness" to those observing the process. The military judge should grant a challenge for cause under the rule to preserve the appearance of fairness in the trial, even if the judge believes the challenged member will be impartial. The military judge should apply a liberal standard in granting such a challenge, but we give great deference to the judge's ruling, and we will not overturn a denial of a challenge unless we find a clear abuse of discretion by the judge. *United States v. Denier,* 43 M.J. 693, 700–01 (A.F. Ct. Crim. App. 1995).

We find the military judge acted well within his discretion in fashioning the remedy he did. Even the two "victim" members were not susceptible to automatic excusal in view of their responses, *Denier,* 43 M.I. at 701–02, but their excusal removes the potential for any implied bias on their part. With regard to the other six members, the military judge carefully listened to their answers, and he closely watched them as they spoke. The judge's articulation of his observations as he announced his ruling confirms his careful attention. The judge's articulation of his observations regarding their demeanor and credibility makes his ruling even more unassailable in this case. *See United States v. White,* 36 M.J. 284, 287 (C.M.A. 1993), *cert. denied,* — U.S. —, 114 S.Ct. 918, 127 L. Ed. 2d 212 (1994); *Denier,* 43 M.I. at 701.

Finally, we applaud the military judge's decision to allow additional voir dire of the members after they announced their

findings on the contested specifications and were told of the offenses to which the appellant had pleaded guilty. This was not required, but it provided additional opportunity to test the members' impartiality after they had become more fully informed as to the scope of the appellant's misconduct. Because of the way in which the military judge handled the unusual turn of events in this case, we conclude that a reasonable, disinterested layman observing the proceedings would not see the continued participation of the panel as casting doubt on the legality, fairness, and impartiality of the trial. *See United States v. Barrow,* 42 M.J. 655, 661 (A.F. Ct. Crim. App.); *pet. granted,* 43 M.J. 418 (199S). We resolve this assignment of error against the appellant.

The appellant also claims error and asks that we set aside his conviction because the military judge "failed to *sua sponte* declare a mistrial" when he learned of the thefts. When it appears to the military judge that grounds for a mistrial may exist, but neither side has asked that one be declared, the military judge must seek the views of both sides before acting. The judge may not simply *sua sponte* declare a mistrial. R.C.M. 91S(b). in this case, however, no reason existed for the military judge to conduct a mistrial inquiry because of the relief the defense sought, which required of the judge the same analysis. We likewise resolve this assignment of error against the appellant.

Finally, we have carefully considered the appellant's claim that his sentence is unduly severe. It is correct that the appellant had approximately 14 years service at the time of his trial. By virtue of multiple nonjudicial punishment actions, some of which were for misconduct similar to that which brought him to this court-martial, the appellant had worked his way down from staff sergeant to airman. After carefully considering the entire record of the offender and the circumstances of his offenses, we cannot say the appellant's

sentence is inappropriately severe. *United States v. Healy,* 26 M.J. 394 (C M.A. 1988); *United States v. Snelling,* 14 M.J. 267 (C.M.A. 1982).

The findings and the sentence are correct in law and fact and are

AFFIRMED.

Chief Judge DIXON and Senior Judge SCHREIER concur.

OFFICIAL

LAURA L. GREEN
Clerk of Court